United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 29, 2003

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Region 5

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Patriot Contract Services, LLC
Case 5-CA-29880

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This case was submitted for advice as to: (1) whether certain provisions in the Employer's computer policy are overbroad and unlawful under Section 8(a)(1) of the Act; and (2) whether the Charging Party-employee was engaged in protected Section 7 activity when he sent a union-related e-mail message in which he referred to the captain of the ship on which he worked as a "screw loose on deck," stated that the captain's "buddy" was a "thief and batterer," and threatened to file EEOC, NLRB and other charges against the captain.

We conclude that the following provisions of the Employer's computer policy are unlawfully overbroad: (1) E-mail use that the Company deems "not in its best interest" could be cause for discipline (paragraph 4); and (2) "'Grand Standing' of issues is discouraged and may be cause for disciplinary action" (paragraph 8). However, we find lawful paragraph 5 of the policy, which states, in part, that all "Company related" correspondence should be sent with the masters approval or awareness and that "business e-mail should be concise and to the point." That paragraph is lawful because the rule is clearly intended to reach job-related or "business" concerns and, in context, cannot reasonably be read as applying to Section 7 activity. We further conclude that the Charging Party was engaged in protected, concerted activity when he sent the e-mail in question. The allegedly improper remarks it contained were not violent or extremely flagrant, and were substantially provoked by unfair labor practices on the part of the Employer.

FACTS

Patriot Contract Services, LLC, ("the Employer") staffs and manages the USNS Shughart, a U.S. Military Sealift Command vessel. Sailors' Union of the Pacific ("SUP" or "the Union") represents a unit of ordinary seamen aboard the Shughart. The Employer and the Union are parties to a collective-bargaining agreement with a term of July 1, 1999 to September 30, 2005.

On May 7, 2001,[1] Charging Party Steven Rappolee began working for the Employer as an ordinary seaman on board the Shughart. Either in the first week or early in the second week of his employment, Rappolee was elected by fellow deck hands as the Union representative/deck delegate.

Three issues involving management soon arose for Rappolee as the new deck delegate. The first involved the food available to sailors during the evening meal. The day he was elected deck delegate, Rappolee approached Shughart Chief Steward Toyokazu Gonzales, who was in charge of the cooks, to try to resolve this problem. Apparently not succeeding in this discussion, Rappolee told Gonzales that he would try the "grievance route" to resolve the issue. A few days after being elected deck delegate, Rappolee spoke with Shughart Chief Mate Paul Shepard regarding a grievance about how overtime was being compensated.[2] Rappolee contends that this conversation became "heated." During the third week in May, Rappolee filed a grievance on behalf of approximately five SUP members, five Marine Firemen and Oilers Union members, and four Marine Engineers Beneficial Association members regarding the extreme heat these sailors had been exposed to when the generator broke down. After a discussion with Chief Mate Shepard about whether Rappolee could properly file a petition on behalf of non-SUP members, another Union representative was assigned to handle that grievance.

Also during the third week in May, Rappolee obtained an e-mail account from the Employer. Mostly during off-duty hours, Rappolee used the ship's computer to write grievances. Off-duty, he would file or notify the Union about grievances via e-mail, communicate via e-mail with Liam Flynn, an SUP deck delegate on another Employer ship,

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[1] All dates are in 2001 unless otherwise indicated.

[2] The Employer wanted to give compensatory time for the overtime worked by the employees. According to Rappolee, the contract required monetary compensation.

and post messages to electronic bulletin boards (mostly dissident union bulletin boards).

During the first week of June 2001, [*FOIA Exemption 6*

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That same day, June 20, Captain Higgins issued an oral warning to Rappolee for improper use of the ship computer, posting grievances, slander, innuendo, making false accusations and improper use of Navy communications. [*FOIA Exemptions 6, 7(C), and 7(D)*] when he gave Rappolee this warning, he told him that the policy was that he was not to utilize the [e-mail] privilege for the purpose of belittling the management of this vessel by means of slanderous, inflammatory and false statements and that personal e-mails otherwise had to be concise.

That night, Rappolee sent e-mail messages about that day's events, [*FOIA Exemption 6*
,] to the website moderator for the Marine Engineers Beneficial Association website and to fellow SUP deck delegate Flynn to post on electronic message boards.

The next day, June 21, SUP Union Representative Jack Stasko made a routine visit to the ship to speak with the unit employees.[4] Rappolee announced two times over the Employer's intercom that Stasko was in the galley for a Union meeting. Chief Mate Shepard arrived in the galley and told Stasko that there were to be no more Union meetings in the galley, and that meetings had to be within break time. Stasko responded by cursing. Rappolee yelled to Shepard and Captain Higgins, who was also present, that they were violating the Union contract and past practice. Rappolee also told the Captain that at his first

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[3] [*FOIA Exemption 6*

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[4] The collective bargaining agreement between the parties states that Union meetings "may be held at any time that does not interrupt the operation of the vessel."

opportunity he was going to file an NLRB charge. The Captain accused Rappolee of threatening him.

Also on June 21, 2001, the Employer sent a letter to the SUP president regarding the oral warning given to Rappolee. The letter stated, among other things:

> Mr. Rappolee's *grandstanding* of internal labor issues is unacceptable and must be stopped. This is clearly a violation of Company policy and is unacceptable behavior under our Collective Bargaining Agreements and jeopardizes our relationship with the customer, MSC. His actions also jeopardize the entire crews' use of the customer's email system. (emphasis added).

That day, June 21, Captain Higgins issued Rappolee a written warning, which stated:

> In accordance with the verbal instructions conveyed at the investigative meeting of 6/20/01, you are hereby instructed to cease and desist from all disruptive behavior, including but not limited to the following:
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> 1. Issuing false accusations and threats to other crewmembers;
> 2. Distribution of frivolous and/or spurious charges, which inveigh against the Master of the USNS Shughart or any crewmember - particularly via e-mail;
> 3. Attending "Union" meetings while on regular working hours;
> 4. Announcing Union meetings over the ship's public address system; and
> 5. Violation of routine established "chain of command" and/or contracted SUP grievance procedures.
>
> Any furtherance of the above practices will constitute grounds for your dismissal.

Higgins alleges that he advised Rappolee at the time of the written warning that if Rappolee thought [*FOIA Exemption 6* ,] Rappolee should have followed the chain of command and reported it to his department head rather than take matters into his own hands and [*FOIA Exemption 6*]. Higgins contends that after he spoke to Rappolee and issued the written warning, Rappolee continued to "grandstand" about how there was a thief on the ship, and that it was the Captain's duty to do something about it. In its position statement, the

Employer stated that the written warning was a "direct order" by the Captain.

That same evening, June 21, Rappolee sent e-mail messages (while off-duty) to various employees to post on electronic bulletin boards. These e-mails, entitled "Abuse Aboard the USNS Shughart" and "Captain's Abusive Behavior," concern generally the written warning Rappolee received from the Captain for posting e-mails regarding [*FOIA Exemption 6* ,] and the Captain's stopping of the June 21 Union meeting. In the latter e-mail, Rappolee refers several times to the Captain as a "screw loose on deck" and states that the Captain's "buddy" [*FOIA Exemption 6* .] Rappolee concludes the e-mail by stating that he will "hound [the Captain's] ass through EEOC, NLRB, and my faverite (sic) Labor Racketeering intill (sic) he retires."

The Captain discharged Rappolee the next day for "Violation of Master's 'Letter of Warning' dated June 21, 2001" and for violation of the Employer's computer policy. That policy states, in part:

> (4) E-mail Usage: ... It will be monitored and any use that the Company deem[s] not in its best interest could be cause for disciplinary action.
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> (5) All Company related correspondence generated from the vessels should be sent with Masters approval or awareness.... Business e-mail should be concise and to the point. Opinions and innuendo should be avoided.
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> (8) ... "Grand Standing" of issues is discouraged and may be cause for disciplinary action.

In its position statement, the Employer noted that Rappolee's June 21 e-mails "undermined the Captain's authority" and "reflected negatively and incorrectly on Captain Higgins' ability to run the ship in the manner required and expected by the United States Military Sealift Command." The Employer stated that Rappolee was terminated for "disobeying direct orders of the Captain ... and thereby compromising the vessel's command structure."[5]

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[5] Section 6(a) of the contract, entitled "Orders and Rules," states that "[i]f a crewman believes that a direct order of superior officers is inconsistent with this Agreement, he shall nevertheless comply with the order, but upon request made to his department head, he shall receive written

On December 27, 2002, the Region issued a complaint alleging that the Employer violated Section 8(a)(1) of the Act by announcing and maintaining a rule that prohibited employees from holding Union meetings during "working hours,"[6] and that it violated Section 8(a)(1) and (3) by issuing the oral warning to and discharging Rappolee. The Charging Party amended the charge to additionally allege as unlawful the written warning he received and the Employer's computer e-mail policy.[7]

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the following provisions in the Employer's computer policy are unlawfully overbroad: (1) E-mail usage "... will be monitored and any use that the Company deem[s] not in its best interest could be cause for disciplinary action" (paragraph 4); and (2) "'Grand Standing' of issues is discouraged and may be cause for disciplinary action" (paragraph 8). The Region should not allege as unlawful paragraph 5 of the policy, which states, among other things, that all "Company related" correspondence should be sent with the masters approval or awareness and that "business e-mail should be concise and to the point." That paragraph is lawful because the rule is clearly intended to reach job-related or "business" concerns and, in context, cannot reasonably be read as applying to Section 7 activity.

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confirmation of such order from the superior officer giving such order."

[6] The Region concluded that this new rule is unlawful because it fails to limit the prohibition to "working time." In addition, the Region found the rule to be unlawful because it represents a change from the past practice, which was in place until Rappolee started sending the challenged e-mail messages, of allowing Union Representative Stasko to hold Union meetings during working hours.

[7] The Region is also considering a related Section 8(b)(1)(A) charge against the Union (Case 5-CB-9363) filed by Rappolee, alleging that the Union unlawfully failed to represent him or to pursue a grievance on his behalf after he was terminated by the Employer.

We further conclude that none of the statements in Rappolee's June 21, 2001 e-mail message rendered his activity unprotected.

I. Certain Provisions of the Employer's Computer Policy Are Unlawfully Overbroad.

The test for whether the mere maintenance of a rule unlawfully interferes with employees' exercise of Section 7 rights is whether it would "reasonably tend to chill employees in the exercise of" those rights.[8] For example, in Lafayette Park Hotel, the Board found unlawfully overbroad a rule that prohibited employees from "[m]aking false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees" because it "fail[ed] to define the area of permissible conduct in a manner clear to employees" and could cause employees to refrain from making statements that were protected by the Act.[9]

The Board consistently has applied the rationale that an employer's undefined, ambiguous rules are unlawfully overbroad if they can reasonably be interpreted as prohibiting or chilling Section 7 conduct. In Adtranz, ABB Daimler-Benz,[10] the Board found unlawful an employer rule prohibiting "abusive or threatening language to anyone on company premises" because "abusive language" was not defined in the rule and that term reasonably could have been interpreted to include lawful union organizing propaganda or rhetoric. Similarly, in University Medical Center, the Board found unlawfully overbroad a rule that prohibited, among other things, "disrespectful conduct" because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope" and could reasonably be interpreted by employees as prohibiting Section 7 communications.[11]

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[8] See Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

[9] Id., 326 NLRB at 828.

[10] 331 NLRB 291, 293 (2000) (citing Linn v. United Plant Guards, 383 U.S. 53 (1966) (union campaign rhetoric is protected even when it includes "intemperate, abusive, and inaccurate statements")), vacated in relevant part 253 F.3d 19 (D.C. Cir. 2001).

[11] 335 NLRB No. 87, slip. op. at 4 (2001). See also Great Lakes Steel, 236 NLRB 1033, 1036-37 (1978) (rule

On the other hand, the Board has found lawful employer rules that cannot be interpreted in a manner that would restrain employees from exercising their Section 7 rights. Thus, the Board found lawful a rule prohibiting employees from "[b]eing uncooperative with supervisors, employees, guests, and/or regulatory agencies or otherwise engaging in conduct not supporting the hotel's goals and objectives."[12] The Board reasoned that the rule addressed legitimate business concerns and only a strained construction of it would have chilled employees in the exercise of their Section 7 rights.[13] The Board also found lawful a rule prohibiting "unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, and the hotel's reputation or good will in the community."[14] The Board held that the rule was lawful because employees could not reasonably have read it as prohibiting protected Section 7 conduct.[15]

Based on these principles, the rules set forth in paragraphs 4 and 8 of the Employer's computer policy are unlawfully overbroad because they are ambiguous and can be interpreted in a manner that could chill employees in the exercise of their Section 7 rights. However, the rule set forth in paragraph 5 is not unlawful because only a strained construction of that rule would interfere with the exercise of Section 7 rights.

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prohibiting distribution of literature that was "libelous, defamatory, scurrilous, abusive or insulting" was unlawful), enfd. 625 F.2d 131 (6th Cir. 1980).

[12] Lafayette Park Hotel, 326 NLRB at 825.

[13] Id.

[14] Id. at 827.

[15] Id.

A. Paragraph 4

We conclude that the maintenance of paragraph 4, which states that e-mail use that the Company deems "not in its best interest" could be cause for discipline, is ambiguous and facially unlawful. The Employer fails to define what protected conduct would be considered permissible or give examples of activities not in the best interest of the Employer so that employees would know that Section 7 activities would not be prohibited by the rule. An employee could reasonably interpret this provision to prohibit activities that are protected by Section 7. As a result, the rule has a reasonable tendency to cause employees to refrain from engaging in protected activities rather than risk being disciplined. Thus, this rule is similar to the one found unlawful in Lafayette Park (prohibiting "false" or "profane" statements toward the employer) and is distinguishable from the other rules found lawful in that case because they provided a clear non-Section 7 context to the types of conduct prohibited.

B. Paragraph 5

We conclude that the maintenance of paragraph 5 of the Employer's computer policy should not be alleged as unlawful. It states, among other things, that all "Company related" correspondence should be sent with the masters approval or awareness and that "business e-mail should be concise and to the point." That statement is facially lawful, and not ambiguous, because it is clearly intended to reach job-related or "business" concerns and not Section 7 activity.[16]

To the extent that the Employer has actually interpreted paragraph 5 as applying to Rappolee's use of the e-mail system for non-business purposes, i.e., Union communications, the Region has already determined that a complaint should issue alleging the Employer's disparate application and enforcement of its computer policy.

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[16] See, e.g., Lafayette Park Hotel, 326 NLRB at 826-827 (finding lawful rule that prohibited employees from engaging in "unlawful or improper conduct off the hotel's premises ... which affects the employee's relationship with the job ... and the hotel's reputation" because employees could not read rule as prohibiting Section 7 activity).

C. Paragraph 8

We agree with the Region that paragraph 8 of the Employer's computer policy is unlawfully overbroad. This provision states that "'Grand Standing' of issues is discouraged and may be cause for disciplinary action." [*FOIA Exemptions 6, 7(C), and 7(D)*], Captain Higgins defines "grandstanding" as a term used to describe a "self-serving manner or method of rendering complaints." In a letter advising the Union of Rappolee's oral warning, the Employer stated that Rappolee's "grandstanding of internal labor issues is unacceptable and must be stopped."

The unit employees could reasonably interpret paragraph 8 as prohibiting any emphatic communication of work-related complaints. Moreover, the Employer applied the rule against Rappolee to prohibit protected, concerted complaints regarding working conditions and potential grievances. Further, if grandstanding is defined to mean a "*self-serving* manner or method of rendering complaints," that description would clearly apply to any effective Section 7 complaint-related activity.[17]

II. The Statements That Charging Party-Rappolee Made in His June 21, 2001 E-mail Message Did Not Render His Conduct Unprotected.

We conclude that the language of Rappolee's e-mail was not so offensive or egregious as to deprive him of the protection of the Act for his otherwise protected, concerted conduct.

Not every impropriety committed in the course of Section 7 activity deprives the offending employee of the protection of the Act. The Board has held that a line must be drawn between situations where an employee "exceeds the bounds of lawful conduct in a moment of animal exuberance"

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[17] Although the Employer seems to rely on the quasi-military nature of its operation, there is no support for the proposition that different law applies in such cases. See generally Gabriel Security Corp., 1999 WL 33454752, at nn. 3, 8, JD(SF)-104-99 (ALJD dated December 17, 1999) (employer who provided security guard services to United States Military Sealift Command and other parts of the government violated Section 8(a)(1) and (3) by maintaining facially overbroad rules and discharging employees pursuant to those rules despite employer's claim that rules necessary due to "para-military" nature of organization).

or in a manner not improperly motivated and those "flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service."[18] In determining whether an employee who otherwise has engaged in protected activity has crossed that line, the Board has identified several factors to consider:

> (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice.[19]

In this case, the statements in Rappolee's June 21 e-mail message entitled "Captain's Abusive Behavior" did not render his conduct unprotected. The discussion took place on the e-mail message boards. The e-mail concerned protected Union and working condition issues, including the written warning Rappolee had received from the Captain (for posting e-mails regarding [*FOIA Exemption 6*] and the Captain's stoppage of the June 21 Union meeting. Rappolee's remarks were clearly provoked in substantial part by the Employer's unfair labor practices. His e-mail specifically complained about the written warning and the Employer's banning of Union meetings during working hours, both of which are alleged as unfair labor practices in the outstanding complaint.

Regarding the nature of the "outburst," Rappolee's e-mail message referred several times to the Captain as a "screw loose on deck," and states that the Captain's "buddy" is a "thief and batterer." In making these statements, his conduct was not violent or so serious as to render him unfit for further service.[20] Rather, as the

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[18] Prescott Industrial Products Co., 205 NLRB 51, 51-52 (1973), enf. denied in relevant part 500 F.2d 6 (8th Cir. 1974). See also American Hospital Association, 230 NLRB 54, 56 (1977), enfd. 84 Lab. Cas. ¶ 10,826 (7th Cir. 1978); J.W. Microelectronics Corp., 259 NLRB 327, 327-328 (1981), enfd. 688 F.2d 823 (3d Cir. 1982).

[19] The Loft, 277 NLRB 1444, 1467 (1986) (quoting Atlantic Steel Co., 245 NLRB 814, 816 (1979)).

[20] See, e.g., American Hospital Association, 230 NLRB at 56 ("The mere fact that an employee may be sarcastic or insulting in his pursuit of activity otherwise protected should not and does not in and of itself render the

Region notes, the bulk of this e-mail message addressed workplace problems where Rappolee was airing his grievances and seeking advice from fellow Union members and reflects that Rappolee was carrying out his duties as deck delegate with "animal exuberance." Similarly, Rappolee's threat in the message to "hound [the Captain's] ass through EEOC, NLRB, and my faverite (sic) Labor Racketeering intill (sic) he retires," was also protected.[21]

Therefore, we conclude that Rappolee's statements in the June 21 e-mail were not so egregious as to render his conduct unprotected.[22]

Accordingly, the Region should issue a complaint, absent settlement, alleging that paragraphs 4 and 8, but not 5, of the Employer's computer policy are unlawfully overbroad and violate Section 8(a)(1). The Region should continue its processing of this case on the basis that Rappolee was engaged in protected, concerted activity in sending the allegedly abusive e-mail.

B.J.K.

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activity unprotected or him unfit for continued employment. It must indeed be 'flagrant' or 'fraught with malice.'")

[21] See Vought Corp., 273 NLRB 1290, 1295 (1984) (employee threat to supervisor that "I'll have your ass" not a threat to do anything more than file a grievance or Board charge and does not lose the protection of the Act.)

[22] Compare Aluminum Co. of America, 338 NLRB No. 3, slip op. at 2-3 (2002) (conduct lost the protection of the Act based on the location of the profane outbursts, the comparative severity of the outbursts and their occurrence in a stable labor relations environment free of any apparent employer animus against employees for grievance activity.)